"In Your Heart You Know [They're] Right"

Conservative Voices Opposed to Court Stripping

During the last congressional frenzy to attack the independent judiciary and assert congressional primacy over individual rights guaranteed by the U.S. Constitution, many Conservative voices rose in opposition. Below are some examples.

U.S. Senator Barry Goldwater (R-AZ).

· "The Supreme Court has erred, but we should not meet judicial excesses with legislative excesses. Now it is busing abortion and prayer. But what will it be next? Will a majority lay hold of Congress who puts all actions of the Internal Revenue Service beyond judicial scrutiny?" Quoted in: Stuart Taylor Jr., *Attacks on Federal Courts Could Shift Historic Roles,* New York Times, May 16, 1982.

· "What particularly troubles me about trying to override constitutional decisions of the Supreme Court by a simple bill is that I see no limit to the practice. There is no clear or coherent standard to define why we shall control the Court in one area but not another. The only criterion seems to be that whenever a momentary majority can be brought together in disagreement with a judicial action, it is fitting to control the federal courts." Congressional Record, Sept 10, 1985.

· "I am a little surprised that the Senator from North Carolina decided to outlaw the Supreme Court from our life. I think it is unconstitutional. The Senator is beginning to get into areas now that are frankly none of our business…I am really kind of surprised that he would write this bill. If I wrote it, I would have been ashamed of it." Congressional Record, September 10, 1985 (Debating legislation that would have stripped the U.S. Supreme Court of jurisdiction on school prayer cases.)

· "If there is no independent tribunal to check legislative or executive action all the written guarantees or rights in the world would amount to nothing." Quoted in: Stuart Taylor Jr., *Attacks on Federal Courts Could Shift Historic Roles,* New York Times, May 16, 1982.

Theodore Olson, Then Assistant Attorney General in charge of the Office of Legal Council. (Former Solicitor General of the United States of the current Administration).

· "Jurisdiction [stripping] proposals raise 'some fairly difficult constitutional questions.'" Quoted in: Charles Babcock, *Justice Doing Something Right…or Left?*, Washington Post, August 24, 1981.

· "Olson noted that respected conservative scholars such as Yale Law School professor Robert Bork consider the jurisdiction-stripping proposals unconstitutional." Charles Babcock, *Justice Doing Something Right…or Left?*, Washington Post, August 24, 1981.

Robert Bork, Then Professor at Yale Law School, later Reagan appointee to the DC Circuit Court of Appeals and nominee to the U.S. Supreme Court. On stripping federal courts of jurisdiction and allowing state courts to be the final arbiters of the Constitution:

- "You'd have 50 different constitutions running around out there, and I'm not sure even the conservatives would like the results." Quoted in: Frank Trippet, *Trying to Trim the Courts*, Time, September 28, 1981.

Attorney General William French Smith, Reagan Administration.

"Congress may not…consistent with the Constitution, make 'exceptions' to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers." Letter of Attorney General William French Smith to Senate Judiciary Chairman Strom Thurmond on S. 1742, May 6, 1982. (S. 1742 would have stripped the U.S. Supreme Court and lower federal courts of jurisdiction over school prayer cases.)

"It is appropriate to note, however, that even if it were concluded that legislation in this area could be enacted consistent with the Constitution, the Department [of Justice] would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court….The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions." *Id.*

"The remedy for judicial overreaching… is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our system of government. This [legislation] would in many ways create problems equally or more severe than those which the measure seeks to rectify." *Id.*

"The language of the Exceptions Clause does not support the conclusion that the Congress possesses plenary authority to remove the Supreme Court's appellate jurisdiction over all cases within that jurisdiction." *Id.*

"The basic principles of the Constitution – that each branch must be given the necessary means to defend itself against the encroachments of the other two branches – has special relevance in the context of <u>legislative</u> attempts to restrict <u>judicial</u> authority." (emphasis in original) *Id.*

"The Founding Fathers believed in the voice of the people and their elected representatives and placed substantial power in the Legislature. At the same time, however, they were acutely sensitive to the rights of individuals and minorities. Most of them had a first-hand

experience with persecution. The idea of a written Constitution was precisely to place a check on the popular will and, in large part, to restrain the most powerful branch… 'An elective despotism was not the government we fought for…' Federalist No. 48 (Madison)." (emphasis in original). *Id.*

"Nor does it seem likely that the [Constitutional] Convention would have developed the Exceptions Clause as a check on the Supreme Court in such a manner that an exercise of power under the Clause to remove Supreme Court appellate jurisdiction would…vest [the power] in the state courts. Hamilton regarded even the possibility of multiple courts of final jurisdiction as unacceptable." *Id.*